



May 8, 2001

Ms. Anne-Marie P. Sheely
Assistant County Attorney
Travis County
P.O. Box 1746
Austin, Texas 78767

OR2001-1876

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146903.

The Travis County Sheriff's Office (the "TCSO") received a request for information of various types from five news media organizations, including the *Austin American-Statesman* (the "Statesman"), KEYE-TV ("KEYE"), News 8 Austin ("NEWS 8"), KXAN-TV ("KXAN"), and KVUE-TV ("KVUE"). All of the requestors seek information concerning the same incident, which was the execution of a search warrant at 2707 Hwy. 71 E., Lot #23, at approximately 9:30pm on February 15, 2001 (the "incident"), which culminated in the shooting death of a peace officer. The requestors seek, in the aggregate, information in the form of copies of the search warrant and all follow-up warrants, including the supporting affidavits and any warrants returned; tape or transcript records of any 911 calls related to the incident; tape or transcript records of any radio transmissions related to the incident; records of any property or evidence seized at the incident address on February 15, 2001 or February 16, 2001; burglary reports in Del Valle, Texas for the past year; a copy of the TCSO's policy on executing search warrants; and copies of all search warrants executed and returned by the Narcotics Task Force and TCSO SWAT Team over the past six months, including but not limited to name and address, probable cause affidavits, responding officers, evidence or property seized, and level of force used. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108, and of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You indicate that with the exception of the Narcotics Task Force and TCSO SWAT Team search warrant information, copies of all requested search warrants, returns of such warrants, and the supporting affidavits concerning the incident have been released, and that you no longer seek exception to disclosure for such information. You have also released the burglary reports to KVUE. Additionally, in response to a request from KVUE for the TCSO's policy regarding the execution of search warrants, you inform us that the TCSO has no such specific policy. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Provided that such information did not exist at the time the respective request was received, the TCSO is under no obligation to release it.

Regarding the KVUE request for copies of all search warrants executed and returned by the Narcotics Task Force and TCSO SWAT Team for the past six months, you assert that because the TCSO maintains no database of such warrants, you have no information responsive to the request. You have submitted no copies or representative samples of this information, and have asserted no exception under subchapter C of the Public Information Act with regard to this request. See Gov't Code § 552.301(b) (providing that a governmental body must submit to this office a request for a decision *and state the exceptions that apply* no later than the 10th business day after the date of receiving the request for information); *see also* Gov't Code § 552.301(e)(1)(A) (providing that a governmental body must submit to this office, no later than the 15th business day after receiving the written request, written comments stating the reasons why the stated exceptions would allow the information to be withheld). Inasmuch as KVUE seeks copies of the executed warrants themselves, and not database records, your assertion does not clearly indicate that you possess no information responsive to this request. A governmental body has a duty to make a good faith effort to relate a request for information to the information the governmental body holds. Open Records Decision No. 561 at 8 (1990). Although the TCSO maintains no database of search warrants issued or executed, to the extent the TCSO has copies of the actual search warrants responsive to the request, the TCSO must release them. *See* Gov't Code § 552.302.

You have informed us that with respect to the request by KVUE,¹ you failed to ask for a decision from this office within ten business days following your receipt of that request. We will begin consideration of your asserted exceptions with that request.

Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

The 911 tapes were the subject of requests that preceded the KVUE request. The TCSO timely submitted requests for decisions as to those prior requests for the 911 tapes. Because the TCSO has complied with section 552.301(b) in timely asking for a decision as to the 911 tapes, the TCSO has not waived its section 552.108 exception claim for the 911 tapes. We first address the TCSO's section 552.108 claim for the 911 tapes and attached records of radio traffic transmissions.

¹This request encompassed two search warrants signed by Judges Lynch and Kocurek on February 15, 2001 and February 16, 2001, respectively, for 2702 Hwy. 71, Lot 23; copies of warrants returned; tape of a 911 call placed between 9:15 and 10:30pm from the Delamora residence at 2702 Hwy. 71, Lot 23; tape of any 911 call placed on February 15, 2001 between 9:15 and 10:30pm relating to the incident at 2702 Hwy. 71, Lot 23; list of property and/or evidence seized at 2702 Hwy. 71, Lot 23 on February 15, 2001 and February 16, 2001; burglary reports for Del Valle, Texas for the past year; copy of the TCSO's policy on executing search warrants; and copies of all search warrants executed and returned by the Narcotics Task Force and TCSO SWAT Team over the past six months, including but not limited to name and address, probable cause affidavits, responding officers, evidence or property seized, and level of force used.

Under section 552.108(a)(1), information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime may be withheld if release of the information would interfere with the detection, investigation, or prosecution of crime. Since you have represented that there is an ongoing criminal prosecution stemming from the incident, we conclude that the 911 tapes and information pertaining to radio traffic transmissions fall within the exception permitted by subsection 552.108(a)(1). Accordingly, the TCSO may withhold the 911 tapes and information pertaining to radio traffic transmissions.²

Next, we will address the TCSO's untimely request to withhold the list of property or evidence seized. You assert that the TCSO received the KVUE request for information on February 20, 2001, but that your request for a decision was not forwarded for appropriate action until after the expiration of the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994).

In Open Records Decision No. 586 (1991), we concluded that the need of a governmental body, other than the one that has failed to timely comply with the requirements for requesting an attorney general decision under the Public Information Act, to withhold information from disclosure may be a compelling reason to overcome the presumption that the information is public. Although you did not demonstrate the applicability of section 552.108 to the requested information within the ten-day time period prescribed by section 552.301 of the Government Code, you inform us that the Travis County District Attorney's Office (the "district attorney") is pursuing an active criminal prosecution related to the incident, and that the district attorney is currently seeking an indictment in the case. Additionally, you assert that the district attorney feels that release of the information responsive to the KVUE request would interfere with the prosecution of the associated criminal case. Accordingly, we conclude that the need of another governmental body to withhold the requested information under section 552.108(a)(1) provides a compelling reason for nondisclosure of

²Since section 552.108 is dispositive, your request for exception to disclosure under sections 552.101 and 552.103 need not be addressed.

the information. Open Records Decision No. 586 (1991). Thus, in the case of the KVUE request, the TCSO may withhold the list of property or evidence seized at the incident address, under section 552.108(a)(1) on behalf of the district attorney.

In summary, provided that none existed at the time the request was made, the TCSO is under no obligation to release information regarding TCSO policy on execution of search warrants. The TCSO may withhold the 911 tapes and information pertaining to radio traffic transmissions, and lists of property or evidence seized at the incident address. The TCSO must release, if such information is available, copies of all search warrants executed and returned by the Narcotics Task Force and TCSO SWAT Team for the six months preceding the date of the request for such information, including but not limited to name and address, probable cause affidavits, responding officers, evidence or property seized, and level of force used.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Steven Bohl". The signature is fluid and cursive, with the first name "Steven" and last name "Bohl" clearly legible.

Steven Bohl
Assistant Attorney General
Open Records Division

SB/sdk

Ref: ID# 146903

Encl: Submitted documents and tapes

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